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November 9, 2021

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The Honorable Jerrold Nadler
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The Honorable Mitch McConnell
Minority Leader
U.S. Senate
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The Honorable Dick Durbin
Chairman
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Re: H.R. 4193 – Bankruptcy Venue Reform Act of 2021
S. 2827 – Bankruptcy Venue Reform Act of 2021

We support H.R. 4193, and S. 2827, the Bankruptcy Venue Reform Act of 2021¹. Under the current venue provisions in 28 U.S.C. § 1408, corporations can file bankruptcy only in the district in which

¹ The wording of the two bills is virtually identical. The recently introduced Senate bill adds two provisions -- first, the addition of the words "or to the merger, dissolution, spinoff, or divisive merger" to the limitations provision in the wording for new Section 1408(c)(1) and second, the words "in whole or in part" to the language in Section 1408(c)(1)(B). We agree that both additions are useful clarifications that support the overall goals of the bill and ensure that it covers all forms of this conduct.

they have resided for a majority of the 180 days prior to filing. Corporations, however, can file in any district in which they are incorporated, have their principal place of business or principal assets – or in any district where an affiliated entity, no matter how small or recently created, has filed bankruptcy using any of these provisions.

There have been numerous examples where corporations have taken advantage of this freedom: Eastern Airlines, based in Florida, filed in New York in the 1980s, relying solely on the location of its frequent flyer club subsidiary. Enron and Worldcom similarly were able to file in New York in 2001 and 2002 based on initial filings by single small subsidiaries affiliated there, even though they were based in Texas and Mississippi, respectively and had by far the largest amount of their operations in those states. General Motors, an iconic Michigan company, used a single dealership based in Harlem to allow it to file in New York in 2009 while Patriot Coal, which was headquartered in St. Louis and had subsidiaries in a number of coal states, filed in New York based on its incorporation of two new subsidiaries there (where it previously had *no* assets) the month before it filed in 2012. Similarly, the Herald newspaper, which had been publishing in Boston since 1846, filed bankruptcy in Delaware in 2017 and that same year, Venoco, LLC, a Denver-based company, also filed bankruptcy in Delaware following massive losses incurred from an oil spill from its Santa Barbara, CA operations. There are many other examples of such filings in venues that have nothing to do with a debtor's primary operations or business.

By incorporating a single subsidiary in a favored jurisdiction, corporations can engage in rampant forum shopping, allowing them to pick a court with favorable law on issues ranging from the merits of the claims against it to the applicable statutes of limitation, the fees that its lawyers will be able to command, and the releases it will seek to provide to its officers, insiders, and non-debtor third parties. This ability to control the law to be applied to one's affairs is not allowed in any other area of the law. At a minimum, it has encouraged placing cases in some of the most expensive legal markets in the country, contributing to the growing costs of these cases.

Under the current venue provisions, for many years the most significant bankruptcy cases were filed in the Southern District of New York or the District of Delaware despite neither being the natural venue for such filings. On a number of occasions this has been done through shell subsidiaries created solely for the purpose of enabling such a filing. The same issue has begun to arise in a few other districts in recent years and while we respect the expertise of the judges in these districts, we reject the argument that other judges are not equally capable of exercising an expertise in corporate cases, large or small or that there is something inherent in those districts that makes those courts uniquely qualified to handle such cases. Moreover, by allowing debtors to choose their courts – and, in some instances their

own judge from a group of only one or two – this inherently exposes those judges and their decisions to heightened scrutiny and criticism. That is particularly true when the ability to choose those courts and judges lies solely within the unilateral control of the debtor itself. No other defendant is allowed such freedom, but the current system plainly allows such abuse.

The issues arising from such forum shopping are problematic enough standing alone; they provide an even greater problem for the overall system in that, no matter how fairly the favored judges attempt to be in their rulings, the debtor's actions inevitably taint how other parties view them. The results from a bankruptcy case are already hard enough to accept for a party that sees itself as victimized by the debtor; that distrust can only be exacerbated if it sees the rulings as coming from a judge hand-picked by the debtor. As such, we agree with the bill's premise that "reducing forum shopping in the bankruptcy system will strengthen the integrity of, and build public confidence and ensure fairness in, the bankruptcy system," by making corporate debtors file in jurisdictions where they chose to place significant aspects of their basic business operations, not where they choose to litigate about the adverse effects of those operations.

The ability of debtors to limit their filings to a few chosen venues and/or judges is even more significant than in ordinary litigation in that bankruptcy cases have a national effect, yet the binding precedent in the large cases may only issue from a very few courts so there is no ability to assess differing views on the issues or to have those debates rise to higher levels on appeal. That limited ability to appeal and to have determinations made at the highest level (including by the Supreme Court) is particularly true in light of the extremely broad statutory and judge-made limits (such as the so-called "equitable mootness" doctrine) imposed on creditors seeking to appeal decisions that confirm plans. As such, the forum shopping process can result in debtors being able to pick not only the initial, but also, in many cases, the final arbiter of their fate.

Those problems are further underscored by the burdens imposed on those who already have suffered as a result of a corporate debtor's financial collapse who may then be forced to spend substantial additional amounts, travel long distances, and often hire additional local counsel simply to participate on an equal footing with the debtor. While the experience over the last 18 months as the courts have dealt with the COVID-19 pandemic have indicated that some of the worst of those effects can be mitigated by allowing telephonic/virtual appearances, no one doubts that the inability to appear in person or to engage in face-to-face discussions with others in the case puts those in distant locales at a distinct disadvantage. Those disadvantages will reemerge as courts resume in-person hearings, even if they do retain some

adaptations. Moreover, even with those alternative means of appearance, districts generally have retained their rules requiring local counsel for out-of-state parties, which can, in many instances, add substantial additional costs and burdens on a creditor that is already far from likely to be able to recover a meaningful amount of its claim.

In short, by ensuring that debtors whose operations have created adverse impacts on their neighbors are called to account in proximity to those same neighbors, H.R. 4193 and S. 2827 will greatly limit forum shopping while helping consumers and many other parties, large and small alike – including creditors, workers, retirees, shareholders, and small business vendors – to represent themselves without undue burden. The additional language in S. 2827 that bars recognition of a new trend of using “divisive mergers” to split a single entity into one company that retains the profitable operating assets and a second left with the burdensome liabilities of the original company and having only the latter file bankruptcy is a welcome addition.

As state attorneys general, we are charged with guarding our states’ financial interests, enforcing consumer protection laws, protecting our citizens from environmental pollution and combating wrongdoing in whatever form it takes. These duties are difficult enough when corporations file bankruptcy and claim to be financially unable to comply with their legal obligations. The difficulties are multiplied when bankruptcy law allows those debtors to seek relief in distant jurisdictions where the debtors hope to find rulings that are friendlier to their interests than to those of persons and agencies located far away and, at the very least, to greatly increase the difficulties imposed on those seeking to be heard in opposition to the debtor’s desires.

Accordingly, we agree with the tests set forth in H.R. 4193 and S. 2827, limiting where businesses may file by ensuring that they will do so in a jurisdiction in which their “principal assets” or their “principal place of business” are located, and ensuring that it is the *parent’s* status, not that of a minor affiliate, that will determine where the overall case will be heard. These provisions should go far to ensure that bankruptcies are filed in jurisdictions where debtors have the closest connections and where their filings will impose the largest impacts.

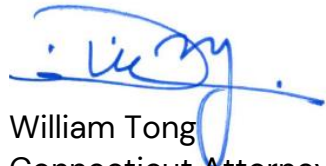
We also support the bills because of their provisions providing for a new rule to be drafted dealing with appearances by governmental attorneys. In our role as representatives of both the state and its aggrieved citizens, we often have to appear in distant jurisdictions because many debtors have nationwide operations that may affect citizens in states all across the county. We recognize and accept that a consequence of this bill will be that we may need to appear in “home courts” of

companies throughout the country, not just Delaware and New York. Each such court currently sets its own requirements for allowing non-local attorneys to appear, including deciding whether to charge an admission fee in each case, and /or to require that we must associate local counsel, even as to matters involving only our own state's laws.

This is by contrast to the Rules for Multidistrict Litigation, which similarly group entities from all over the country into a single litigation forum, but which allow *all* parties to appear by right and without local counsel. The 1994 Bankruptcy Code amendments (Sec. 304 of P.L. 103-394) does grant those rights to governmental child support creditors and this provision has worked without incident. This bill would require rules to be prescribed to similarly allow *all* government attorneys to appear without charge and without being required to associate local counsel. Most courts extend those privileges to counsel for the United States; the bill would simply provide the same treatment for other governmental entities, thus facilitating our ability to appear in bankruptcy courts without delay or unnecessary financial burdens.

For all these reasons, we strongly support this bill and urge you to advance its passage. As the chief legal officers of our states, we have a particular interest in ensuring that we and our citizens can protect our interests by effectively participating in these cases.

Sincerely



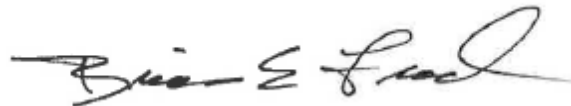
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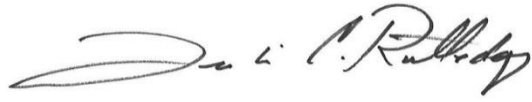
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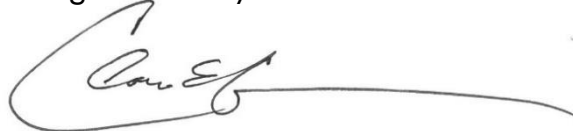
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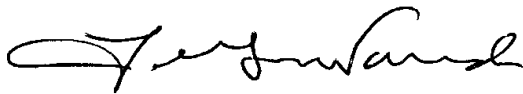
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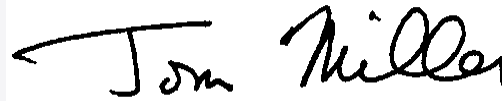
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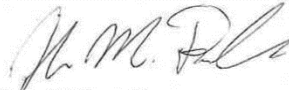
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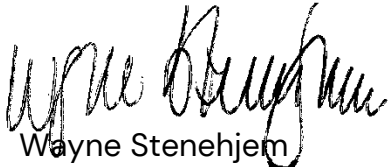
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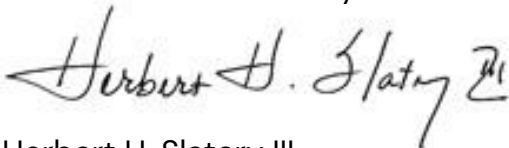
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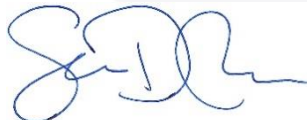
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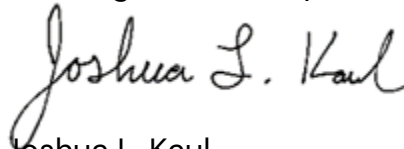
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